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No. 83-1013

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION,
AMERICAN CYANAMID COMPANY,
FMC CORPORATION, AND
UNION CARBIDE CORPORATION,
*Petitioners,*

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., AND
U.S. ENVIRONMENTAL PROTECTION AGENCY,
*Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## BRIEF FOR PETITIONERS

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## QUESTIONS PRESENTED

1. Whether the decision of the court of appeals is contrary to this Court's holding in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112, 128 (1977) that effluent limitations may be "set by regulation, so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause" in its regulations.

2. Whether the court below was incorrect in ruling that § 301(l) of the Clean Water Act precludes the granting of a variance for toxic pollutants to atypical plants that can demonstrate a factor not considered by EPA in establishing national technology-based regulations.

3. Whether the decision below, by removing EPA's discretion to deal with atypical situations either by individual orders or by rulemaking, is contrary to this Court's decision in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947).

## PARTIES

The parties to this action are as follows:[1]

Chemical Manufacturers Association, American Cyanamid Company, FMC Corporation, Union Carbide Corporation;

Natural Resources Defense Council, Inc.; and

U.S. Environmental Protection Agency.

The Natural Resources Defense Council, Inc. ("NRDC") was the petitioner below. The U.S. Environmental Protection Agency ("EPA") was the respondent. The Chemical Manufacturers Association, *et al.*, were intervenor-respondents below.[2]

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[1] In accordance with Rule 28.1 of the Rules of the Supreme Court, the parent companies, subsidiaries and affiliates of each corporate party to the brief are set forth in the Appendix to the Petition for a Writ of Certiorari ("Pet. Appx.") at A-111.

[2] The above list includes all parties to the separately-briefed case numbers 81-1977 and 81-1985 below. The decision below also ruled on petitions filed by other parties which did not involve the questions presented here. The parties to these other cases below are set forth in the Petition for a Writ of Certiorari at ii.



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## BRIEF FOR PETITIONERS

### OPINION BELOW

The opinion of the United States Court of Appeals for the Third Circuit in *National Association of Metal Finishers* v. *EPA* is reported at 719 F.2d 624 and is reprinted at page A-1 of the Appendix to the Petition for a Writ of Certiorari ("Pet. Appx.").

### JURISDICTION

The order of the court of appeals was entered on September 20, 1983. The Petition for a Writ of Certiorari was filed on December 19, 1983, and granted on April 30,

1984, together with the petition in No. 83-1373. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(l) (1982).

## STATUTES AND REGULATIONS INVOLVED

This case involves technology-based "pretreatment standards" under § 307(b) of the Clean Water Act, 33 U.S.C. § 1317(b) (1982). Section 301(b) of the Act, 33 U.S.C. § 1311(b) (1982), describes various effluent limitations and standards that dischargers of pollutants are to achieve. The factors that the Administrator must consider in establishing effluent limitations and standards are set forth in § 304(b) of the Act, 33 U.S.C. § 1314(b) (1982). Sections 301(c) and (g) of the Act, 33 U.S.C. § 1311(c) and (g) (1982), authorize modifications of certain of the § 301 limitations and standards. Section 301(l) of the Act, 33 U.S.C. § 1311(l) (1982), provides that the Administrator may not modify the requirements of § 301 for toxic pollutants. Sections 301(b), 301(l), 304(b) and 307(b) of the Act are set forth in Pet. Appx. at A-116-21. Sections 301(c) and (g) are set forth in the Appendix to this brief at 1a.

The EPA regulation at issue in this case governing the establishment of "fundamentally different factors" ("FDF") variances is codified at 40 C.F.R. § 403.13 (1983), and is set forth in Pet. Appx. at A-122.

## STATEMENT OF THE CASE

The Clean Water Act requires EPA to promulgate effluent limitations guidelines and standards, based on the use of available technology, governing the discharge of pollutants by American industry. The statute also specifies the factors, such as cost and technical feasibility, that EPA must take into account in promulgating such limitations and standards. To carry out its task, EPA has



divided industry into major categories, collected data on an industry-by-industry basis, and promulgated guidelines and standards for each industry category. Within a single industry category, however, there may be hundreds, or even thousands, of dischargers. Thus, developing limitations and standards for even a single industry category is a challenging task.

As a matter of necessity, EPA has focused its efforts in promulgating such limitations and standards on the more typical plants in an industry. EPA has left to subsequent individual proceedings the development of limitations and standards, based on the statutory factors, for atypical or "fundamentally different" plants not previously considered. This long-standing EPA practice has resulted in significant cost and time savings in the development of industry guidelines and standards and has helped insulate such guidelines and standards from challenges by atypical plants.

The judgment of the Third Circuit struck down EPA's procedure for considering fundamentally different dischargers of toxic pollutants subject to pretreatment standards. This case thus involves the important issue of EPA's authority to apply the statutory factors to establish pretreatment standards for fundamentally different plants in individual proceedings.

### Legislative Background

The Clean Water Act established technology-based treatment requirements for all dischargers to waters of the United States. These requirements are applicable to plants that discharge water directly to waters of the United States ("direct dischargers") and plants that discharge to municipal sewer systems ("indirect dis-

chargers").[1] While direct and indirect dischargers are covered by separate programs and separate provisions of the Act, EPA has established comparable treatment requirements for these two groups of dischargers.

For direct dischargers, the Clean Water Act established a two-phase technology-based program. Section 301(b)(1)(A) of the Act, 33 U.S.C. § 1311(b)(1)(A) (1982), required "point source" direct dischargers to achieve by July 1, 1977, effluent limitations based on the application of the "best practicable control technology currently available" ("BPT"). By July 1, 1984, or in some cases July 1, 1987, the Act requires "classes and categories" of direct dischargers to achieve effluent limitations based upon the "best available technology economically achievable" ("BAT"). 33 U.S.C. § 1311(b)(2)(A) (1982). These BPT and BAT limitations, which are incorporated in permits issued to direct dischargers, are to be based upon effluent limitations guidelines promulgated by EPA pursuant to § 304(b), 33 U.S.C. § 1314(b). Indirect dischargers to municipal sewer systems (or publicly-owned treatment works ("POTWs")) are required to comply with pretreatment standards promulgated by EPA under § 307(b) of the Act, 33 U.S.C. § 1317(b), for pollutants that are not susceptible to treatment by POTWs or would interfere with the operation of POTWs.[2] Relying upon legislative history that suggests that pretreatment standards are to

[1] In the case of indirect dischargers, the wastewater is generally treated first by the industrial discharger as required by federal, state and local requirements. Then the wastes of industrial dischargers are combined with municipal and domestic wastes and are treated at a publicly-owned treatment works before being discharged to United States waters.

[2] While § 307(b)(3) directs EPA to designate the "category or categories" of sources to which particular standards will apply, it does not specify all of the criteria for developing pretreatment standards.



be comparable to limitations for direct dischargers, EPA has established technology-based pretreatment standards comparable to BPT and BAT limitations.[3]

Congress intended these effluent limitations and standards to be as uniform as possible across industry categories. But Congress also intended for EPA to take account of the similarities and differences that exist among plants within an industry category and among industry categories. Only similar plants were to be subject to similar effluent limitations and standards.[4]

Congress also provided for certain case-by-case waivers of applicable BAT and pretreatment requirements. Thus, not even all similar plants were to be subject to uniform treatment requirements. In particular, §§ 301(c) and (g) of the Act, 33 U.S.C. §§ 1311(c) and (g), allow the Administrator to modify applicable BAT limitations and pretreatment standards in prescribed circumstances relating to economic and water quality impacts.[5] Pur-

[3] H.R. Rep. No. 830, 95th Cong., 1st Sess. 87 (1977). *See* discussion at 17-18, *infra*.

[4] As Congress stated in 1972:

> Except as provided in section 301(c) of this Act, the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be *precise in his guidelines* under subsection (b) of this section, *so as to assure that similar point sources with similar characteristics*, regardless of their location or the nature of the water into which the discharge is made, *will meet similar effluent limitations*.

S. Rep. No. 1236, 92d Cong., 2d Sess. 126 (1972) (emphasis added).

[5] Under § 301(c), a discharger may be relieved of its obligation to meet BAT effluent limitations or pretreatment standards if the Administrator finds that less stringent limitations or standards "will represent the maximum use of technology within the economic capability" of the discharger and "will result in reasonable further progress toward the elimination of the discharge of pollutants." 33 U.S.C.

suant to § 301(l), which was originally introduced as part of §§ 301(c) and (g),[6] the Administrator may not modify requirements of § 301 of the Act for toxic pollutants. 33 U.S.C. § 1311(l). As discussed below, the § 301(c) and (g) waivers are quite different in nature from the FDF variances involved here.

**Administrative Background**

EPA has developed BPT, BAT and pretreatment requirements through a series of extensive rulemaking proceedings covering 21 major industry categories and 65 toxic pollutants or groups of pollutants. These effluent limitations and standards are developed simultaneously, with the pretreatment standards generally being set at levels equal to the BPT and BAT limitations for direct dischargers.[7]

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§ 1311(c). Such economic waivers are not available from BPT limitations. Section 301(g), 33 U.S.C. § 1311(g), requires the Administrator, with the concurrence of the state, to relieve a discharger from the obligation to meet BAT limitations or pretreatment standards for nonconventional pollutants where the discharger demonstrates, *inter alia*, that the waiver of its obligations will not interfere with water quality.

[6] See discussion at 28-30, *infra*.

[7] This strategy was the basis for settling suits by four environmental groups, and the resulting settlement agreement was approved in 1976. NRDC v. Train, 8 E.R.C. 2120 (D.D.C. 1976), *modified sub nom.* NRDC v. Costle, 12 E.R.C. 1833 (D.D.C. 1979), *modified sub nom.* NRDC v. Gorsuch (D.D.C. Oct. 26, 1982), *modified sub nom.* NRDC v. Ruckelshaus, Nos. 2153-73 *et al.* (D.D.C., Aug. 2, 1983 and Jan. 6, 1984) (hereinafter referred to as the "NRDC Consent Decree"). In the 1977 amendments to the Clean Water Act, Congress sanctioned the Agency's approach to establishing effluent limitations and standards. *See* EDF v. Costle, 636 F.2d 1229, 1244 (D.C. Cir. 1980).



In developing these limitations and standards, EPA is required by the statute to consider certain factors. In particular, § 304(b) requires EPA to take into account the age of the equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impacts (including energy impacts) and the costs of control.[8] In order adequately to consider these factors, EPA engages in an extensive data-collection effort, compiling information on the pollutants discharged by an industry, the processes employed, the treatment technologies used by the industry or available for use, the treatability of the pollutants, and the economics of the industry. Usually, the data indicate differences among segments of the industry and EPA will establish subcategories within the industry to reflect those differences in the effluent limitations and standards that are promulgated.

EPA recognized at an early stage in the development of guidelines and standards that it would not always be possible during the rulemaking proceeding on the nationally-applicable requirements to gather and take into account data relating to each statutory factor for

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The Act also authorizes EPA to establish new source standards for new dischargers. 33 U.S.C. § 1316 (1982). Congress established a separate program for new sources because it believed that new sources could be constructed to meet more stringent requirements than could be applied to existing plants, which would have to retrofit their facilities to meet treatment requirements. FMC Corp. v. Train, 539 F.2d 973, 981 n.13 (4th Cir. 1976). EPA is also establishing new source pretreatment standards for new indirect dischargers. Variances to new source standards and new source pretreatment standards are not allowed by EPA and are not an issue in this case.

[8] In establishing BPT limitations, EPA must balance these costs against effluent reduction benefits.

every discharger in an industry category. Thus the Agency recognized that, if the § 304 statutory factors are to be considered in the establishment of limitations and standards applicable to a plant, it must develop a procedure whereby those factors may be considered in an individual proceeding for those relatively few plants that can demonstrate that they are fundamentally different from the typical plants EPA considered in developing the regulations applicable to an industry category. The mechanism that EPA developed to apply the statutory factors to these atypical plants was the "fundamentally different factors" ("FDF") variance proceeding. The FDF variance regulation for direct dischargers is codified at 40 C.F.R. § 125.31 (1983); the regulation applicable to indirect dischargers is found in 40 C.F.R. § 403.13 (1983).[9]

The term "variance" is a misnomer. It is not an exemption from the technology-based requirements of the Act. A plant which receives an FDF variance must achieve BPT, BAT or pretreatment, as the case may be. The FDF procedure is more accurately characterized as an individualized determination of the appropriate BPT, BAT or pretreatment standards, applying the § 304 factors, for those "fundamentally different" plants whose operations are not adequately covered by EPA's industry-wide regulations.

EPA's "variance" regulation provides that any interested person may apply to EPA for an FDF variance

[9] A copy of 40 C.F.R. § 403.13 appears in Pet. Appx. at A-122. Although this case technically involves only the FDF variance for indirect dischargers, the same issues arise with respect to the variance regulation for direct dischargers. NRDC has indicated that it intends to raise these issues in an ongoing proceeding in the United States Court of Appeals for the District of Columbia Circuit. NRDC v. EPA, D.C. Cir. Nos. 80-1607, *et al.*



for a plant that is believed to be "fundamentally different" from the plants EPA considered in developing industry-wide requirements. The variance may result in discharge limits that are either more or less stringent than the limits for the industry category.[10] A plant that receives a variance from a pretreatment standard is *not exempted* from the standard, but will be given an individual standard determined by applying the § 304 factors to the plant. In order for a discharger to obtain an FDF variance, it must satisfy two key requirements. It must first show that it is fundamentally different from the other plants in the industry in ways corresponding to the § 304 factors.[11] The discharger must then demonstrate that compliance with the industry standards would result in either a pollutant removal cost wholly out of proportion to the cost considered by EPA in developing the standards, or a non-water quality environmental impact fundamentally more adverse than the impact that EPA considered in developing the standards.[12]

The FDF variance mechanism has to date been used sparingly. Nonetheless, the FDF variance has proved to

[10] A member of the public may apply to EPA for a variance seeking the application of different, more stringent limits to a fundamentally different plant, or the plant may apply for a variance seeking different, less stringent limits. A variance request may also be initiated by EPA.

[11] These factors are: the nature or quality of pollutants, the volume of the discharger's process wastewater, the non-water quality environmental impact of control and treatment, the energy requirements of treatment technology, the age, size, land availability and configuration as they relate to the discharger's equipment or facilities, processes employed, process changes, engineering aspects of the application of the control technology, and the cost of compliance with required control technology. 40 C.F.R. § 403.13(d) (1983).

[12] 40 C.F.R. §§ 403.13(c)(2)(iv) and (c)(3)(ii) (1983).

be essential in certain cases. An example well illustrates this point.

Freeport Chemical Company operates a phosphoric acid manufacturing plant in Uncle Sam, Louisiana. On June 3, 1981, EPA granted Freeport an FDF variance from the BPT effluent limitations for flouride, total phosphorous, and total suspended solids.[13] The Agency found that the Freeport plant design differed from the typical phosphoric acid manufacturing plant because it used a "once-through" cooling water system in which river water was pumped through the plant for cooling purposes, treated, and discharged. The plants EPA had examined in developing its regulations for the industry used recycling systems, and the Agency's BPT regulation thus allowed for no discharge. Freeport determined that compliance with such limitations would require it to retrofit its plant at a cost of $27 million, with annual operating costs of $13 million. By contrast, EPA had estimated that plants with recycling systems would have to spend, on average, only $500,000, with an annual operating cost of $40,000, in order to comply with the regulations.

Freeport's predicament dramatically illustrates the need for an FDF variance procedure. In formulating regulations for a diverse industry category, EPA cannot possibly take into account every important difference that exists among the many plant designs and processing techniques. Inevitably, there will be an atypical plant or process that does not fit neatly into the subcategories EPA has established. In order to deal with these in-

[13] In the Matter of Freeport Chemical Company, Final Decision of the Administrator Concerning the Request of Region VI, U.S. Environmental Protection Agency, for Approval of Alternative Effluent Limitations for Freeport Chemical Company, Uncle Sam, LA., Pursuant to 40 C.F.R. § 418.12, FDF 78-01 (June 3, 1981).



stances fairly and efficiently, EPA must have available a mechanism that will allow it to formulate requirements that apply the § 304 factors to such atypical plants.

EPA has relied upon the FDF variance in virtually every effluent limitation and standard regulation under §§ 301(b), 304(b) and 307(b) of the Act. It has enabled EPA to focus on typical facilities in the development of industry-wide regulations, with the knowledge that an atypical plant can receive individualized limitations and will not be able to convince a court to overturn an entire set of industry regulations on the sole ground that the regulations are unlawful as applied to it. Thus the FDF variance procedure is an essential, limited "safety valve" in EPA's effluent limitations and standards program.

**Judicial Decisions**

The FDF variance procedure has been approved, and indeed held to be required, by several courts of appeals and by this Court. We will discuss these prior decisions briefly before turning to the contrary decision below.

The Natural Resources Defense Council, Inc. ("NRDC") first challenged the FDF variance in the United States Court of Appeals for the Second Circuit. *NRDC* v. *EPA*, 537 F.2d 642 (2d Cir. 1976). NRDC argued that the variance provision violated the congressionally mandated goal of national uniformity and the intent of Congress that subcategories of industry be the only means for dealing with variations among dischargers. 537 F.2d at 644, 646. EPA responded, and the court of appeals agreed, that Congress intended uniform treatment only for similar plants and, in formulating regulations that will apply to thousands of plants, EPA will undoubtedly overlook distinguishing characteristics

of individual plants. 537 F.2d at 646. The court of appeals noted:

> It is entirely possible that the . . . regulations will prove ill-suited to some of the unsampled individual plants to which they will be applied in the permit process. Unless the variance clause is established, there is no guarantee that such a defect could be effectively remedied if it occurred.
>
> * * *
>
> *Without variance flexibility, the program might well founder on the rocks of illegality.* 537 F.2d at 647 (emphasis added).

The court thus held that the FDF variance regulation was a valid exercise of EPA's authority under § 501(a) of the Clean Water Act to promulgate regulations that are necessary and proper to implement the Act. *Id.*

This Court subsequently approved—and indeed required—the FDF variance in *E.I. du Pont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977) ("*du Pont*"), a case in which NRDC was also involved as *amicus curiae*. The major issue in *du Pont* was whether EPA was authorized to promulgate regulations establishing single number effluent limitations for categories of industry, or whether EPA could promulgate only effluent limitations guidelines establishing ranges of limitations to be applied to individual plants on a case-by-case basis in permit proceedings.[14] This Court concluded that EPA had the authority to establish BPT and BAT limitations by regulation "*so long as some allowance is made for variations in individual plants, as EPA has done by including a variance clause in its [BPT] limitations.*" 430 U.S. at 128 (emphasis added).

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[14] See discussion at 18-20, *infra*.



This Court further elaborated upon the importance of FDF variances in *EPA* v. *National Crushed Stone Association*, 449 U.S. 64 (1980) ("*National Crushed Stone Association*"). There the Court noted that effluent limitations adopted without reference to the statutory factors for a particular atypical discharger were incomplete and that the variance mechanism was an acknowledgment that the regulations would otherwise be defective:

> If a point source can show that its situation . . . is not within the range of circumstances considered by the Administrator, then it may receive a variance. . . . In such situations, the variance is an acknowledgment that the uniform BPT limitation was set without reference to the full range of current practices, to which the Administrator was to refer. Insofar as a BPT limitation was determined without consideration of a current practice fundamentally different from those that were considered by the Administrator, that limitation is incomplete. *Id.* at 77-78.

NRDC next challenged EPA's FDF variance provision in *Appalachian Power Co.* v. *Train*, 620 F.2d 1040 (4th Cir. 1980). In *Appalachian Power*, NRDC argued that Congress' enactment in 1977 of § 301(l), which prohibits modifications of § 301 requirements for toxic pollutants, barred FDF variances for toxic pollutants. EPA responded, and the court of appeals agreed, that an FDF variance is not a modification of applicable limitations but is instead an individual determination of the appropriate limitations. EPA argued that § 301(l) of the Act was intended to apply only to the § 301 modifications, namely the economic waiver in § 301(c) and the water quality waiver in § 301(g). The court upheld EPA's interpretation of § 301(l).

Undaunted, NRDC again challenged the FDF variance in the proceeding below in the United States Court of

Appeals for the Third Circuit. The suit concerned EPA's general pretreatment regulations, codified at 40 C.F.R. Part 403, and in particular the FDF variance regulation in 40 C.F.R. § 403.13 (1983).[15] NRDC argued that the FDF variance was unlawful on two grounds. First, NRDC argued that FDF variances were generally unlawful because they were not authorized by the Clean Water Act. Recognizing that this Court in *du Pont* construed the Clean Water Act to require FDF variances, NRDC argued that the *du Pont* decision was limited to BPT variances and did not apply to variances from BAT or pretreatment standards. NRDC's second argument was that § 301(l) of the Act prohibited FDF variances for toxic pollutants. Relying upon this Court's *du Pont* decision and other cases, EPA responded that FDF variances are necessary, if not required, to apply the statutory factors to atypical plants not considered by the Agency in its rulemaking proceeding to establish requirements for an industry category. EPA also argued, as it had in *Appalachian Power* v. *Train*, *supra*, 620 F.2d at 1046-47, that § 301(l) applied only to modifications of applicable requirements authorized by §§ 301(c) and (g) of the Act, and not to FDF variances.

The Third Circuit did not address NRDC's broader argument that FDF variances are unlawful under the Clean Water Act. The court did hold, however, that § 301(l) prohibited FDF variances for toxic pollutants, rejecting the distinction EPA made between FDF variances and §§ 301(c) and (g) modifications. The court also rejected EPA's argument that the principle of this

[15] EPA first promulgated the general pretreatment regulations on June 26, 1978 (43 *Fed. Reg.* 27736-773). Following further rulemaking, revised general pretreatment regulations were promulgated on January 28, 1981 (46 *Fed. Reg.* 9404-60).



Court's decision in *du Pont* authorizes EPA to allow FDF variances from pretreatment standards.

## SUMMARY OF ARGUMENT

A "variance" for fundamentally different plants is entirely consistent with, and indeed required by, the Clean Water Act. It is a recognition that the regulations promulgated by EPA are defective as to fundamentally different plants because EPA did not consider the statutory factors in relation to those plants in establishing industry-wide regulations. FDF variances are an appropriate mechanism for remedying this defect by applying the statutory factors to atypical plants, thus implementing congressional policy that only similar plants should be treated similarly.

This Court and others have upheld EPA's FDF variance regulation. Indeed the courts have required such a variance if EPA is to promulgate industry-wide regulations. While the prior judicial decisions have addressed only the FDF variance from BPT requirements, the same rationale applies equally to both BAT and pretreatment requirements. Absent the variance mechanism, EPA's industry-wide regulations would be unlawful as applied to atypical plants not considered by EPA in applying the statutory factors to determine the industry requirements.

Moreover, EPA is authorized by § 501(a) of the Clean Water Act, 33 U.S.C. § 1361(a) (1982), to issue whatever regulations are necessary to carry out the provisions of the Act. The FDF variance is necessary to insure that uniform regulations are applied to similar plants, and different regulations are applied to dissimilar plants. Even in the absence of such general rulemaking authority, however, courts have long recognized the discretion

of regulatory agencies to allow variances from rules of general applicability as a means of addressing particular situations. Such variances are necessary to assure due process in individual cases.

FDF variances are not modifications or waivers of applicable requirements; they are a mechanism for implementing the statutory requirements for a specific atypical plant not previously considered. Congress did not intend by adopting § 301(l) of the Clean Water Act to overrule this Court's decision in *du Pont* requiring FDF variances or EPA's practice of granting such variances to fundamentally different plants. Congress was aware of the *du Pont* decision and of EPA's practice of allowing FDF variances. If it sought to overrule them, it would have done so explicitly. Rather, § 301(l) was intended only to prohibit for toxic pollutants the waivers authorized by §§ 301(c) and (g) of the Act.

Finally, NRDC does not dispute that EPA could address atypical plants during its rulemaking on the industry-wide standards, if it were practically feasible to do so, and create separate regulations for toxic pollutants as appropriate for each atypical plant. NRDC does not claim that the congressional goal of uniformity or § 301(l) would bar such subcategorization where justified by the statutory factors. It objects only to EPA's chosen method of addressing atypical plants in individual proceedings rather than by rulemaking. NRDC is thus trying to dictate to EPA the procedures it must follow in applying the § 304 factors to atypical plants, contrary to decisions of this Court recognizing the discretion of an agency to proceed by rule or by adjudication.



## ARGUMENT

### I. A VARIANCE FOR FUNDAMENTALLY DIFFERENT PLANTS IS SUPPORTED BY THE LANGUAGE AND STRUCTURE OF THE CLEAN WATER ACT.

#### A. FDF Variances Are An Integral Part of the Technology-Based Requirements of the Act.

Congress clearly delineated the factors EPA is required to consider in establishing BPT and BAT effluent limitations guidelines. For BPT, EPA must consider the total cost of application of treatment technology in relation to the effluent reduction benefits to be achieved, as well as the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various control techniques, process changes, nonwater quality environmental impacts, and other factors that the Administrator deems appropriate. 33 U.S.C. § 1314(b)(1)(B) (1982). EPA must consider the same factors in establishing BAT limitations, except that the cost consideration is the total cost of achieving the expected effluent reduction, rather than the total cost in relation to benefits. 33 U.S.C. § 1314(b)(2)(B) (1982). Section 307(b) of the Act, 33 U.S.C. § 1317(b), requires EPA to promulgate pretreatment standards for those pollutants that are not susceptible to treatment by a publicly-owned treatment works or that would interfere with the operation of such works. While § 307 is silent on how such pretreatment standards are to be established, the legislative history indicates that they are to be technology-based:

> Under the amendment to Section 307(b) the Administrator would establish national pretreatment

> standards for toxic pollutants based on the best available technology economically achievable. . . .[16]

Thus EPA has been applying the § 304 statutory factors in the development of pretreatment standards for existing sources comparable to BPT and BAT.[17] This is entirely consistent with the NRDC Consent Decree.[18]

While Congress was quite precise in § 304 in enumerating the factors that EPA had to consider in developing effluent limitations guidelines, it was less than precise on how those guidelines were to be applied. Congress stated in § 301 of the Act, 33 U.S.C. § 1311 (1982), that dischargers had to comply with BPT, BAT and pretreatment standards, but did not specify who was to set those standards. Industry took the position that § 304 authorized EPA only to promulgate guidelines for industry categories, including ranges of effluent limitations, and that specific limits could be set only in a permit proceed-

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[16] H.R. Rep. No. 830, 95th Cong., 1st Sess. 87, *reprinted in A Legislative History of the Clean Water Act of 1977*, Comm. on Envt'l and Pub. Works, Serial No. 14, 95th Cong., 2d Sess. 271 (1978) (hereinafter cited as "1977 Leg. Hist.").

[17] The Agency has in addition been promulgating new source pretreatment standards for new indirect dischargers comparable to new source standards for direct dischargers.

[18] *See* note 7, *supra*. Section 307 authorizes a POTW to revise pretreatment standards for toxic pollutants to reflect the amount of pollutants that the POTW removes in its own treatment system. These so-called "removal credits" are available to *all* indirect dischargers—including both typical dischargers considered by EPA in developing pretreatment standards and atypical dischargers not considered by EPA. Removal credits were intended to further the intent of Congress that redundant treatment by POTWs and indirect dischargers be avoided to the extent possible. H.R. Rep. No. 911, 92d Cong., 2d Sess. 113 (1972); S. Rep. No. 1236, 92d Cong., 2d Sess. 120 (1972). Thus removal credits have nothing to do with the statutory factors considered in developing pretreatment standards and are entirely distinct from FDF variances.



ing on a case-by-case basis, taking into account the peculiarities of the particular plant. EPA argued in response that it was authorized by § 301 of the Act to set single-number effluent limitations for industry categories, based upon consideration of the § 304 statutory factors. This issue was ultimately joined in this Court in the *du Pont* case.

In *E. I. du Pont de Nemours & Co.* v. *Train*, 541 F.2d 1018 (1976), the United States Court of Appeals for the Fourth Circuit interpreted the Clean Water Act as allowing EPA to promulgate regulations setting forth specific BPT and BAT limits that would be presumptively applicable to classes and categories of existing dischargers. The court held, however, that the presumption could be rebutted by a particular facility in an application for a variance from these nationally uniform, industry-wide regulations. *Id.* at 1028.

On review by this Court, industry argued that the Act treated effluent limitations guidelines differently from pretreatment and new source standards. Industry argued that Congress gave EPA the authority to establish specific, numerical pretreatment and new source *standards* while at the same time allowing the Agency only to promulgate *guidelines* for BPT and BAT effluent limitations.[19] EPA responded that the statute "as a

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[19] If the industry position had prevailed in *du Pont*, there would be no need for FDF variances. Individual plant circumstances would be considered in establishing effluent limitations on a case-by-case basis in permit proceedings. Since the Court's construction of the Act leaves no room for such individual consideration of the statutory factors solely in permit proceedings, however, those factors must be considered somewhere. For typical plants, EPA considers those factors in the rulemaking to establish industry-wide requirements. The FDF variance proceeding is an appropriate mechanism for applying these statutory factors to atypical plants not considered in such rulemaking.

whole" shows that Congress used the terms "limitation" and "standard" as equivalents, and did not intend the use of one or the other to affect the scope of the Administrator's authority.[20] NRDC agreed with EPA's position, arguing strenuously that "the different statutory terms—'standards' and 'effluent limitations'—are of no relevance" in determining EPA's authority under § 301 of the Act.[21]

This Court held that EPA clearly had the authority to promulgate national uniform, industry-wide regulations for the second step of effluent limitations, namely BAT limits. *du Pont*, 430 U.S. at 126-27, 136. It based this decision on the language in § 301 that referred to "effluent limitations for categories and classes of point sources." *Id.* at 127. Although § 301 referred to the BPT limits as limitations "for point sources," the Court found that "[n]othing elsewhere in the Act . . . suggests any radical difference in the mechanism used to impose limitations" for BPT and BAT. *Id.* Thus this Court agreed with the Fourth Circuit that "the statute authorizes the 1977 [BPT] limitations as well as the 1983 [BAT] limitations to be set by regulation, *so long as some allowance is made for variations in individual plants*, as EPA has done by including a variance clause in its 1977 limitations." *Id.* at 128 (emphasis added).

The Court's rationale in *du Pont* applies equally to pretreatment standards for existing sources. As noted above, Congress clearly intended that pretreatment standards be established comparable to technology-based limits for direct dischargers. Accordingly, a variance is

[20] Brief for Respondents at 47, *du Pont*, *supra*.

[21] Brief for Natural Resources Defense Council, Inc. as *Amicus Curiae* at 39 n.104, *du Pont*, *supra*.



necessary to apply the statutory factors to establish pretreatment standards for atypical indirect dischargers.[22]

[22] The use of the words "standards" and "effluent limitations" in the Act is of no import. Both NRDC and EPA argued in *du Pont* that the words "standards" and "effluent limitations" were used interchangeably in the Act and that the terms had no regulatory significance. *See* discussion at 19-20, *supra*. NRDC based its position in part on the use of "standards" in § 316(b) to refer to § 301 effluent limitations and legislative history in which Congress referred to the setting of "standards" pursuant to §§ 301 and 306 of the Act. Brief for National Resources Defense Council, Inc. as *Amicus Curiae* at 39 n.104, *du Pont*, *supra*.

Because of the fundamental difference between existing dischargers and new source dischargers, this Court's decision in *du Pont* disallowing variances from new source standards should be limited to new source standards and new source pretreatment standards. As EPA explained in its brief in *du Pont*, an existing facility may have unique problems arising from its particular technology, operating methods or equipment that the Administrator could not—and did not—consider in promulgating standards for the industry category: "Variances are necessary to ensure that application of the general standards to existing plants that have those unique problems will not subject them to requirements *which are demonstrably inappropriate* for the particular facility." Brief for the Administrator of the Environmental Protection Agency at 13, *du Pont*, *supra* (emphasis added). Such regulations are "inappropriate" because they do not apply the statutory factors in determining the requirements for the atypical plant.

Similar problems do not exist for new sources—whether they be new source indirect dischargers subject to new source pretreatment standards or new source direct dischargers subject to new source standards. As EPA explained in its *du Pont* brief, since these new sources have not yet been constructed, application of one uniform set of standards to them cannot require them to make changes in their existing technology, operation or processes. *Id.* at 13-14. Thus, the application of such standards to them cannot result in demonstrably unfair requirements.

This Court reaffirmed the need for variances in the Clean Water Act's implementation in *EPA* v. *National Crushed Stone Association*, 449 U.S. 64 (1980). There, the Court noted that in cases where a discharger can show that its situation is not within the range of circumstances considered by the Administrator in establishing regulations for an industry category, "the variance is an acknowledgement that the uniform BPT limitation was set without reference to the full range of current practices, to which the Administrator was to refer. Insofar as a BPT limitation was determined without consideration of a current practice fundamentally different from those that were considered by the Administrator, *that limitation is incomplete*." 449 U.S. at 77-78 (emphasis added).[23] While the decision in *National Crushed Stone Association* was addressed only to FDF variances from BPT requirements, the rationale applies equally to BAT requirements and pretreatment standards for existing sources.

In *National Crushed Stone Association*, the Court also discussed with approval EPA's description of the FDF

[23] Other courts had previously recognized that the FDF variance procedure is critical to EPA's promulgation of treatment requirements for existing sources. The United States Court of Appeals for the Tenth Circuit upheld regulations that had been challenged on the ground that they did not take the statutory factors into account across the industry because a variance procedure was available to apply those factors to fundamentally different plants. Kennecott Copper Corp. v. EPA, 612 F.2d 1232, 1244 (10th Cir. 1979). The D.C. Circuit in Weyerhaeuser v. Costle, 590 F.2d 1011, 1040-41 (1978), also upheld the promulgation of industry-wide effluent limitations because EPA's variance mechanism provided flexibility. The court held that the variance was "crucial." *Id.* *See also* American Frozen Food Institute v. Train, 539 F.2d 107, 131 (D.C. Cir. 1976); American Iron & Steel Institute v. EPA, 526 F.2d 1027, 1061 (3d Cir. 1975), *modified*, 560 F.2d 589 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978).



variance as being not an exception to an applicable technology-based requirement, but rather an individualized determination of the appropriate requirements. *Id.* at 79 n.18. Quoting EPA, the Court noted that, by application of the variance mechanism, dischargers were not excused from meeting applicable requirements; they merely received individual determinations of the statutory requirements. *Id.* The Court noted further that it could not "attribute much weight to those passages in the legislative history . . . that express a desire and expectation that 'each polluter within a category or class of industrial sources . . . achieve nationally uniform effluent limitations. . . .' " *Id.* Since the variance was merely an individual determination of the appropriate statutory requirements, "all" point sources would meet the Act's requirements. That is precisely why § 301(l) of the Act does not preclude FDF variances.

Thus, FDF variances are entirely consistent with and authorized by the Clean Water Act. Without such variances, EPA's regulations, which ignore atypical plants in their development, would be "incomplete" and run afoul of §§ 301 and 304 of the Act.

### B. Variances Are Also Authorized By EPA's General Rulemaking Authority.

Section 501(a) of the Act, 33 U.S.C. § 1361(a), authorizes the Administrator of EPA "to prescribe such regulations as are necessary to carry out his functions" under the Act. As discussed in Part I.A. above, the FDF variance regulation is clearly necessary to implement the requirements of the Act.

Faced with the enormous task of applying the § 304 factors to establish discharge requirements for thousands and thousands of point sources, EPA realized at an early stage that this task could be done only by focusing on

typical plants within an industry. Even with this limitation, it has taken EPA much longer than Congress anticipated to promulgate the necessary requirements; indeed the task is not yet done. EPA also realized that, as this Court has held, its regulations would be incomplete if it did not take the statutory factors into account for all plants in an industry category, including atypical plants. Thus, to insulate its industry-wide regulations from attack on the ground that they did not apply the factors to atypical plants, EPA established the FDF variance regulation to address atypical situations. This is an entirely reasonable exercise of the Agency's authority under § 501 of the Act to promulgate such regulations as are necessary to carry out its obligations under the Act.

Moreover, the courts have long recognized an agency's inherent power to allow variances from rules of general applicability in order to address atypical situations.

In a case involving regulations of the Federal Communications Commission, the United States Court of Appeals for the District of Columbia Circuit emphasized that "a system where regulations are maintained inflexibly without any procedure for waiver poses legal difficulties" because the power of an agency to promulgate general regulations in the public interest "does not relieve it of an obligation to seek out the 'public interest' in particular individualized cases."[24] The court noted further that

> [t]he agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exception based on special circumstances.[25]

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[24] WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[25] *Id.*



This Court, too, has recognized the authority of an agency to establish variance mechanisms to address peculiar factual situations. In *United States* v. *Allegheny-Ludlum Steel*, 406 U.S. 742 (1972), this Court recognized the authority of the Interstate Commerce Commission to exempt certain carriers from its regulations. The Court stated:

> It is well established that an agency's authority to proceed in a complex area such as car-service regulation by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances.[26]

And in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), this Court permitted the Federal Power Commission to exempt small gas producers from its regulations despite the fact that the statutory language empowering the Commission to promulgate regulations was "without qualification or exception."[27]

The rationale of the Court in the above cases applies equally in this case. The establishment of discharge limitations for thousands of diverse plants is a complex task. The authority to establish such limitations by general rule entails a concomitant authority to provide a variance procedure to address peculiar, atypical plants.[28] Judge Leventhal of the D.C. Circuit aptly stated:

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[26] 406 U.S. at 755.

[27] 390 U.S. at 783-84.

[28] This Court may have implicitly relied upon this rationale in its decision in *du Pont* requiring an FDF variance from BPT regulations even though the statute does not expressly provide for such a variance. The Court did not explain whether its decision was required by §§ 301 and 304 of the Act, or whether it was based upon the agency's inherent authority when proceeding by general rules in a complex area.

> Certain limited grounds for the creation of exemptions are inherent in the administrative process, and their unavailability under a statutory scheme should not be presumed, save in the face of the most unambiguous demonstration of congressional intent to foreclose them.[29]

There is no "unambiguous demonstration" in the Clean Water Act that Congress intended to foreclose FDF variances for existing sources. While § 301(l) prohibits modifications of § 301 requirements for toxic pollutants, it does not prohibit—"unambiguously" or otherwise—FDF variances for toxic pollutants. As noted above, application of the § 304 factors to atypical plants requires such variances, and § 501 authorizes the promulgation of the variance regulation.[30]

Procedures such as the FDF variance serve to "ameliorate the rigors of mechanical application of the rules in appropriate cases without making the application of the rules unduly complex for the agency."[31] And a procedure for considering variance applications in a generally applicable regulation "[i]n some sense . . . imparts a construction of 'reasonableness' to the standards as a whole and adopts a more flexible system of regulation than can be had by a system devoid of 'give.' "[32] In addition, this Court has repeatedly upheld regulations in part because an exception provision in the regulations helped assure the parties of due process.[33]

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[29] Alabama Power Co. v. Costle, 636 F.2d 323, 357 (D.C. Cir. 1980).

[30] *See also* the discussion in Part II, *infra*.

[31] Gulf Oil Corp. v. Hickel, 435 F.2d 440, 447 (D.C. Cir. 1970).

[32] Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 399 (1973), *cert. denied*, 417 U.S. 921 (1974). *See* International Harvester Co. v. Ruckelshaus, 478 F.2d 615, 641 (D.C. Cir. 1973).

[33] *See* United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972); FPC v. Texaco, 377 U.S. 33, 40-41 (1964); United States v. Storer Broadcasting Co., 351 U.S. 192, 205 (1956). The absence of a variance provision has from time to time in fact been fatal to a statute. *See, e.g.*, United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973), in which Justice Marshall stressed in his concurring opinion that only similarly situated people should be treated similarly. *Id.* at 517.



There can thus be no doubt that EPA is authorized both by § 501(a) of the Act and by its inherent authority to allow FDF variances from regulations applicable to an industry category for atypical plants. This is reinforced by the fact that, as this Court has recognized, an FDF variance is not in fact an exemption from or waiver or modification of an applicable standard; it is a determination of the appropriate standard under § 304 for an atypical plant. The variance is therefore not a loophole in the statute. By virtue of the fact that its application is circumscribed by the § 304 factors, it is a limited safety valve. And because of its limited nature, it has not proven to be an administrative burden on EPA's resources. Indeed, it would be a greater burden on EPA if the Agency were required to consider *all* plants—including fundamentally different plants—in developing regulations for an industry category.

## II. IN ENACTING § 301(l), CONGRESS DID NOT INTEND TO PROHIBIT EPA FROM GRANTING FDF VARIANCES FOR TOXIC POLLUTANTS.

Section 301(l) of the Act states that EPA may not modify the requirements of § 301 for toxic pollutants. The Court below accepted NRDC's argument that an FDF variance is a modification within the meaning of § 301(l). The basic error in this ruling lies in failing to understand that an FDF variance implements the statute's technology-based requirements rather than modifying or supplanting them.[34]

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[34] *See* discussion at 8-9, *supra*.

Section 301 of the Act requires, *inter alia*, that direct and indirect dischargers achieve technology-based effluent limitations and standards. For toxic pollutants, such requirements are generally set at "best available technology" or "BAT" levels. When a plant receives an FDF variance, it is *not* relieved of its obligation to achieve a BAT limitation or standard under § 301 of the Act. Instead, it is simply receiving an individualized BAT limitation or standard, based on the application of the statutory BAT factors to that plant.

A plant receiving an individual FDF determination for BAT is as much subject to the technology-based requirements of § 301 of the Act as plants subject to the industry-wide BAT regulations. The FDF variance results in an effluent limitation or standard for a discharger based on statutory factors that would have required such limits or standards had EPA been able to take the factors into account during the industry rulemaking. Thus, an FDF variance is simply a different procedure for *implementing* the technology-based requirements of § 301 of the Act; it is not a modification of those requirements forbidden by § 301(l).

In light of the fact that EPA has consistently relied upon the FDF variance in promulgating technology-based requirements under the Clean Water Act and the fact that the courts have held that such variances are an integral part of EPA's program, it is highly unlikely that Congress would have prohibited such variances without expressly stating that it was doing so. Congress was clearly aware in 1977 of EPA's variance procedure and of this Court's decision in *du Pont*, yet the legislative history of § 301(l) indicates no intent to overrule the procedure or *du Pont*. Rather the legislative history of § 301(l), which was originally introduced as part of §§ 301(c) and



(g), indicates that Congress intended only to limit the authority of EPA under §§ 301(c) and (g) of the Act to waive on a case-by-case basis applicable BAT and pretreatment requirements for toxic pollutants.

Section 301(c) of the Act was enacted by Congress in 1972.[35] As adopted, it allowed EPA to waive BAT and pretreatment requirements on a case-by-case basis for all pollutants when economic circumstances so justified. In 1977, the Senate decided to amend § 301(c) to prohibit such waivers for toxic pollutants. Thus, the Senate bill added a clause to § 301(c) prohibiting economic waivers for toxic pollutants.[36]

At the same time, the Senate decided to allow waivers from BAT and pretreatment standards where such waivers would not impair water quality. S. 1952 therefore contained a new § 301(d), which later became § 301(g), specifically authorizing such water quality waivers. Section 301(d) also contained a clause identical to the Senate's proposed amendment to § 301(c) prohibiting the Administrator from granting water quality waivers for toxic pollutants; it did not contain the parenthetical clause which now appears in § 301(g) limiting § 301(g) to pollutants "other than [conventional] pollutants identified pursuant to section 304(a)(4) of this Act, toxic pollutants subject to section 307(a) of this Act, and the thermal component of discharges."[37]

During the Conference Committee deliberations on the amendments to the Clean Water Act, it was decided that,

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[35] Pub. L. 92-500, 92d Cong., 2d Sess. (1972).

[36] *See* S. 1952 and S. Rep. No. 370, 95th Cong., 1st Sess. 44 (1977).

[37] The 1977 House bill to amend the Clean Water Act did not contain a comparable water quality waiver provision. H.R. 3199, 95th Cong., 1st Sess. (1977).

rather than repeating the identical limiting clause at the end of § 301(c) and what had become § 301(g) of the Act, the limitation would be put into a separate § 301(l). In commenting on the Conference Report, Representative Roberts, one of the leaders in the House of Representatives for the 1977 amendments to the Act, stated:

> Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this section, specifically, neither section 301(c) waivers based on the economic capability of the dischargers nor 301(g) waivers based on water quality considerations shall be available.[38]

Recognizing that the legislative history of § 301(l) indicates that Congress was concerned primarily with prohibiting §§ 301(c) and (g) waivers for toxics, the Third Circuit nevertheless found it difficult to imagine why Congress would have disallowed such waivers for toxic pollutants and still permitted FDF variances for toxics. 719 F.2d at 646; Pet. Appx. at A-43. This difficulty results from a fundamental misunderstanding of the difference between §§ 301(c) and (g) modifications and FDF variances.

Sections 301(c) and (g) allow a discharger to avoid compliance with applicable requirements based on the individual discharger's economic capability or water quality considerations. As this Court has recognized, a dis-

[38] 1977 Leg. Hist. at 328-29. Also during the Conference Committee deliberations, the above-quoted parenthetical clause was added to § 301(g). Congress did not explain the addition of the clause, but its inclusion of conventional pollutants and thermal discharges (which had not been excluded from § 301(g) in the Senate bill and were not covered by the new § 301(l)) make it appear that the clause was directed primarily at those pollutants, with the reference to toxics being included for the sake of completeness.



charger that satisfies the requirements of § 301(c) qualifies for a variance "simply because the [discharger] could not afford a compliance cost that is not fundamentally different from those the Administrator has *already considered*. . . ." *National Crushed Stone Association*, *supra*, 449 U.S. at 78 (emphasis added). Similarly, § 301(g) waivers may be granted to typical dischargers simply because compliance with the technology-based limits is not necessary to protect water quality. Thus a discharger may under §§ 301(c) or (g) obtain a modification of applicable requirements on grounds different than EPA may consider in making the technology-based determinations under the FDF procedure.

The distinction between an FDF variance and a statutory modification under §§ 301(c) and (g) lies in the statutory requirements which apply. An FDF variance from BAT would be based on an acknowledgment that the BAT regulation for the plant is deficient or incomplete, and an individualized determination of BAT for the plant based on the statutory criteria for BAT.[39] A plant cannot obtain an FDF variance for reasons of economic unaffordability or good water quality because those reasons are not factors set forth in the Act for BAT.[40] In contrast, a plant may obtain a § 301(c) or (g) modification for reasons of economic affordability or water quality.[41] Unlike an FDF variance, a § 301(c) or (g) modification is not an acknowledgment that the technology-based BAT limitation is incomplete or deficient. Instead, it is a modification of an otherwise valid BAT limitation based on factors different from those set forth in the Act for BAT.

[39] *See* 33 U.S.C. § 1314(b)(2) (1982).

[40] The EPA regulation expressly precludes a variance on those grounds. *See* 40 C.F.R. § 403.13(e)(3) and (4) (1983); Pet. Appx. at A-124.

[41] *See* note 5, *supra*.

Congress was aware both of this Court's decision in *du Pont* and of EPA's practice of granting FDF variances when the 1977 amendments to the Clean Water Act were adopted. NRDC itself brought variances to the attention of Congress. In testimony before the Subcommittee on Environmental Pollution, NRDC testified that a "fundamental variance provision" was integral to the Act's system of "national, uniform, minimum effluent limitations."[42] This Court's decision in *du Pont*, as well as an early decision of the Fourth Circuit upholding variances in *Appalachian Power Co.* v. *Costle*, 545 F.2d 1351 (4th Cir. 1976), were both brought to the attention of Congress during the debate on the 1977 amendments. Representative Clausen, ranking minority member of the Subcommittee on Water Resources, stated during the House debate on the Conference Report to the final 1977 amendments that "[a] full understanding of Public Law 92-500 [the 1972 Clean Water Act] can only be achieved by having an understanding of the case law interpreting the public law."[43] At this point, Rep. Clausen referred to a Library of Congress report on case law under the Clean Water Act.[44] That report specifically discussed *du Pont* and *Appalachian Power*.[45]

The fact that Congress did not override or expressly limit EPA's FDF variance procedure after its attention

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[42] *See* Federal Water Pollution Control Act Amendments of 1977, Hearings before the Subcommittee on Envt'l Pollution of the Senate Comm. on Envt'l and Pub. Works, 95th Cong., 1st Sess., Serial No. 95-H25, Part 9, at 37 (1977).

[43] 1977 Leg. Hist. at 374.

[44] This report was printed as "Case Law Under the Federal Water Pollution Control Act Amendments of 1977," Library of Congress, Congressional Research Service, House Public Works and Transportation Committee Print 95-35.

[45] *Id.* at 20, 28.



was directed to it is evidence that Congress did not intend to circumscribe the procedure. As a general rule, "a consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval."[46] Moreover, this Court has held that Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change.[47] These presumptions are particularly strong when Congress explicitly disapproves of some cases interpreting the Act, as it did in the legislative history of the 1977 amendments to the Clean Water Act.[48] Consequently, the failure of Congress expressly to limit FDF variances or to reject this Court's *du Pont* decision can only be construed as approval and acceptance of the procedure as adopted and implemented by EPA.[49]

The Third Circuit's decision below is not only contrary to the intent of Congress, it also conflicts with the decision of the only other court to address the scope of § 301(l). In *Appalachian Power Co.* v. *Train*, 620 F.2d 1040 (4th Cir. 1980), NRDC argued that § 301(l) barred

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[46] Kay v. FCC, 443 F.2d 638, 646-47 (D.C. Cir. 1970); *see also* Sands, 2A *Statutes and Statutory Construction*, § 49.09 (4th ed. 1973).

[47] Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 382 n.66 (1981).

[48] *See* 1977 Leg. Hist. at 693 (rejecting Sixth Circuit holding that some circumstances justified extension of BPT compliance date), 701 (rejecting Eighth Circuit holding that U.S. Corps of Engineers was exempt from state environmental law).

[49] If Congress had intended to disallow FDF variances, and thus require dissimilar plants to be grouped together and treated similarly, this would raise substantial due process questions.

FDF variances for toxic pollutants. The Fourth Circuit recognized that EPA had interpreted § 301(l) as applying only to §§ 301(c) and (g) and stated that the interpretation of the Agency is entitled to deference. 620 F.2d at 1048. The court concluded that § 301(l) "does not apply so as to require the exclusion of toxic substances" from the FDF variance regulation. 620 F.2d at 1048. The Fourth Circuit was correct in its decision.[50]

### III. THE DECISION OF THE THIRD CIRCUIT UNLAWFULLY INFRINGES ON EPA'S DISCRETION TO PROCEED BY RULE OR BY ADJUDICATION.

If a plant is fundamentally different from the plants considered by EPA in developing requirements for the industry, it is improper under the Act to apply the requirements to it. The issue before this Court is whether the procedure EPA has adopted to deal with fundamentally different plants is appropriate.

There are several ways in which EPA could apply the statutory factors to atypical plants. In theory, EPA could address atypical plants as part of the rulemaking proceeding to establish limitations and standards for an industry category. When EPA develops such industry-wide regulations, it generally finds it necessary in applying the § 304 statutory factors to divide the industry into different groups, or subcategories, and to apply different sets of limits for toxic and nontoxic pollutants for each subcategory. Thus, where justified by the statutory factors, EPA could establish a separate subcategory for each atypical plant (or group of plants) and apply different

[50] NRDC did not petition this Court for a writ of certiorari to review the Fourth Circuit's decision.



toxics limits to that subcategory.[51] Alternatively, EPA could promulgate industry-wide regulations and then consider petitions for rulemaking to amend those regulations to create new subcategories for atypical plants.[52]

EPA clearly has the authority to subcategorize the industry as much as is necessary to reflect relevant differences among plants. Moreover, subcategorization of an industry is within the sound discretion of EPA unless the Agency acts arbitrarily and capriciously.[53] The objective of such subcategorization is to ensure, consistent with the objectives of the Clean Water Act, that similar plants are subject to similar requirements.[54]

NRDC itself concedes that EPA has considerable discretion in establishing subcategories and that, more importantly, EPA can establish subcategories for individual plants that are significantly different from the other plants in an industry. At oral argument below, NRDC stated:

> We have never contended either in the [NRDC] consent decree or in the context of specific effluent guidelines that EPA does not have considerable discretion in the creation of subcategories. EPA, for

[51] This course has proved impractical, however. EPA is simply unable to collect or consider all the relevant data to establish the necessary subcategories during the rulemaking, particularly within the time frames contemplated by the Act and imposed by the NRDC Consent Decree. *See* note 7, *supra*. As a result, EPA considers only typical plants during the industry-wide rulemaking proceeding, leaving to the FDF variance proceeding atypical plants that the Agency cannot consider.

[52] NRDC appears to agree that EPA could follow this course of action. *See* NRDC v. EPA, *supra*, 537 F.2d at 647.

[53] Kennecott Copper Corp. v. EPA, *supra*, 612 F.2d at 1236, 1246.

[54] *See* note 4, *supra*.

> example, is considering a *subcategory for only one discharger* in the context of the ore mining category. And similarly the agency has created a category for only three inorganic chemical companies. These examples are given only to demonstrate that *we accept the fact that EPA will* in the context of the effluent guidelines themselves, in some cases *have to address specific significant differentiating factors between dischargers* consistent with the criteria in section 304(b).[56]

Thus, NRDC's arguments below that the Act requires the application of uniform standards to indirect dischargers and that § 301(l) prohibits the application of individual standards to atypical dischargers are specious. NRDC agrees that EPA can establish toxics limits for individual plants in separate subcategories as part of the rulemaking proceeding to establish discharge requirements for an industry category.

The only issue, therefore, is whether the FDF variance mechanism that EPA has adopted to address atypical plants—which provides for public notice of the FDF application, and an opportunity for public comments and a public hearing[56]—is appropriate, not whether § 301(l) bars individual toxics limits for fundamentally different plants. The decision of the Third Circuit prohibiting the use of the FDF procedure to establish limits for atypical plants unlawfully infringes upon EPA's discretion to proceed by rule or by adjudication, contrary to this Court's decision in *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947), and its progeny.[57]

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[55] Transcript at 252 (emphasis added). Counsel for NRDC also agreed that EPA "can implement the pretreatment standards flexibly . . . through subcategories." (Transcript at 247).

[56] *See* 40 C.F.R. § 403.13.

[57] *See also* NLRB v. Bell Aerospace Co., 416 U.S. 267, 292-95 (1974); NAACP v. FPC, 425 U.S. 662, 668-69 (1976).



In *Chenery*, the issue was whether the SEC was required to issue a rule prohibiting certain actions or whether it could hear those same actions in individual cases. The Court emphasized that, as here, "problems may arise in a case which the administrative agency could not reasonably foresee," or the problems may be "so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule."[58] The Court concluded that

> the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective. . . . [T]he choice made between proceeding by a general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.[59]

In barring EPA's informed choice of the FDF procedure to deal with atypical plants, the decision below unlawfully infringes on EPA's discretion to proceed by rule or by adjudication,[60] and on EPA's inherent authority to allow variances to ameliorate the rigors of the mechanical application of general rules to particular facts.[61]

Moreover, disallowing the use of variances at this late stage in EPA's development of discharge limitations would create confusion in the program. The Agency has promulgated guidelines and standards for many major industries based upon consideration of typical plants, deferring atypical plants to FDF variance proceedings. If the decision below is allowed to stand, then the basis for these regulations is subject to question. If § 301(l) were to

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[58] 332 U.S. at 202-03.

[59] *Id.* at 203.

[60] *See also* NRDC v. EPA, *supra*, 537 F.2d at 647.

[61] *See* discussion at 23-26, *supra*.

preclude variances for toxic pollutants, EPA might well be subject to requests by industry to reopen previously promulgated regulations to address the atypical plants. If the Agency refused to do so, its regulations would be subject to challenges in the courts.[82]

In addition, EPA is currently developing regulations for the remaining industry categories pursuant to a court-ordered timetable.[83] These regulations include the requirements for the organic chemicals and plastics and synthetic fibers industry, which by EPA's own estimates

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[82] EPA's effluent limitations and standards regulations have in the past been held invalid for failure to consider relevant factors. American Iron & Steel Institute v. EPA, *supra*, 526 F.2d 1027 (3d Cir. 1975), *modified*, 560 F.2d 589 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978); FMC Corp. v. Train, 539 F.2d 973 (4th Cir. 1976); Tanners' Council of America v. Train, 540 F.2d 1188 (4th Cir. 1976). Some regulations were upheld by the courts on the grounds that the FDF variance procedure was available to address atypical situations. *See* note 23, *supra*.

While § 509(b)(1) of the Act, 33 U.S.C. § 1369(b)(1) (1982), generally requires that petitions to review EPA guidelines and standards be filed within 90 days of the promulgation of such guidelines or standards, § 509 explicitly allows late petitions for review if such petitions are based on grounds that arose after expiration of the 90-day period. A decision of this Court disallowing FDF variances would undoubtedly be a sufficient basis for the filing now of petitions for review.

In addition, plants often do not become aware of the need for a variance until they have installed the necessary treatment system and it fails to achieve the expected discharge limits. This would ordinarily not occur until three years after promulgation of applicable EPA regulations. Thus, additional plants already subject to regulations may be expected to apply for variances in the future. While EPA's regulations may require variance applications to be filed sooner, EPA has not yet ruled on whether it will accept late applications, and no court has sustained that time-deadline requirement.

[83] *See* note 7, *supra*.



will cover between 1200 and 2100 facilities. A change in the procedures to address atypical plants will only complicate and further delay EPA's efforts to complete the rulemaking process for the remaining industry categories.

## CONCLUSION

For the foregoing reasons, the decision of the Third Circuit prohibiting FDF variances for toxic pollutants should be reversed.

Respectfully submitted,

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# APPENDIX

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## CLEAN WATER ACT PROVISIONS

1. Section 301(c) of the Clean Water Act, as amended, 33 U.S.C. § 1311(c) (1982):

> (c) Modification of timetable
>
> The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

2. Section 301(g) of the Clean Water Act, as amended, 33 U.S.C. § 1311(g) (1982):

> (g) Waiver for certain pollutants
>
> (1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b)(2)(A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 1314(a)(4) of this title, toxic pollutants subject to section 1317(a) of this title, and the thermal component of discharges) from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—
>
> (A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b)(1)(A) or (C) of this section, whichever is applicable;
>
> (B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and
>
> (C) such modification will not interfere with the attainment or maintenance of that water quali-

ty which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities.

(2) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time period as he is eligible to apply for a modification under this subsection.